IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16/03/2004

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.1072 of 1993

Mariappan alias Muthan .. Appellant

-Vs-

1. V.Selvan
2. Kannammal alias Lolakkal .. Respondents

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree of the II Additional Subordinate Judge, Coimbatore, dated 29.10.1992 in A.S.No.45 of 1992 reversing the judgment and decree of the II Additional District Munsif, Coimbatore, dated 22.1.1992 in O.S.No.1181 of 1985.

!For Appellant : Mr.R.Subramanian
for Mr.S.Narayanan

^For Respondents : Mr.P.Mathivanan for R1
Mrs.N.Krishnaveni

:JUDGMENT

Aggrieved over the judgment of the II Additional Subordinate Judge, Coimbatore, made in A.S.No.45/92, wherein the judgment of dismissal by the trial Court was reversed and a decree was granted by the first appellate forum, the first defendant has brought forth this appeal.
2. The plaintiff proceeded to obtain the relief of permanent injunction with the following pleadings:
The plaintiff was entitled to 1.67 acres in Survey No.361/2, as per the settlement deed dated 31.10.1984, executed by his grandmother Muthakkal. She purchased the property by a sale deed dated 10.11.1941 and was in possession and enjoyment of the same. After the settlement deed was executed by her, the plaintiff was in possession and enjoyment of the property. The patta was transferred in the name of the plaintiff. The defendants have no connection to the suit property. Claiming title over the suit property, the defendants were attempting to interfere with the plaintiff's possession and enjoyment of the property, and hence, there arose a necessity for the plaintiff to file the suit.
3. The suit was resisted by the defendants stating that originally the lands in Survey No.215/2 belonged to one Vaidhyam Chinnayya Chetty; that he had five sons; that one of the sons namely Ayyasamy died leaving his three

sons; that there was a partition among the members on 13.2.1921; that under the partition, the lands measuring 1.67 acres in Survey No.361/2 were allotted to one Mallaiah Chetty, while 1.70 acres of land in Survey No.215/2 were allotted to Chandaiah Chetty; that Mallaiah Chetty was given possession in respect of Survey No.215/2, and Chandaiah Chetty was given possession as regards Survey No.361 /2l; that the said partition deed was not rectified in that regard; that Survey No.361/2 was situated on the east of Survey No.361/1, which belonged to Nanjappa Chetty; that on the death of Chandaiah Chetty, his sons were enjoying the property; that they sold sth share to the first defendant's mother on 11.6.1963 by a registered sale deed; that thereafter, the grandson of Chandaiah Chetty namely Chinnaian sold his ,th share in favour of the mother of the first defendant; that after her, the first defendant was entitled to the property; that only the property in Survey No.215/2 was sold to Muthakkal; that pursuant to the partition on 16.2.67, Survey No.215/2 was allotted to the plaintiff's father; that in that partition deed, Survey No.361/2 was not shown; that the plaintiff's father sold the property in Survey No.215 /2 to one Marakkal; that on coming to know about this, the mistake that has crept in while mentioning the survey number in the sale document in favour of the first defendant's mother, was rectified; that thereafter only, the plaintiff managed to get a settlement deed from his grandmother; that the survey number was wrongly mentioned in the adangal and chitta; that the plaintiff's family was allotted only Survey No.215/2 and not Survey No.361/2; that the plaintiff is not entitled to the relief of permanent injunction, and hence, his claim was to be rejected.

4. The trial Court framed the issues, tried the suit and dismissed the same. Aggrieved, the plaintiff took it on appeal. The learned II Additional Subordinate Judge reversed the judgment of the trial Court and granted the decree in favour of the plaintiff, which is being challenged in this second appeal by the aggrieved first defendant.

5. At the time of admission, the following substantial questions of law were formulated by this Court:

(1) Whether the lower appellate Court is right in deciding the question of title to S.No.361/1 and 2 in occupation of appellant, in the fact of the pleading that the plaintiff is seeking a bare injunction for S.No.361/1?

(2) Whether the lower appellate Court is right in arriving at a conclusion that the plaintiff is in possession of S.No.361/2 merely on presumption, while the documents filed by appellant, have been proved?

6. This Court heard the learned Counsel for the appellant and also the learned Counsel for the respondents on those contentions.

7. As could be seen above, the plaintiff sought for the relief of permanent injunction stating that the land measuring 1.67 acres in Survey No.361/2 belonged to him; and that he has been in possession and enjoyment of the same. The suit was resisted inter alia by the defendants stating that the property actually belonged to the defendants, and even as per the averments in the plaint, the plaintiff cannot have any relief. A perusal of the judgment of the trial Court, wherein the suit was dismissed, would clearly indicate that though it was a suit for permanent injunction, the trial Court in extenso has discussed the entire evidence and has recorded a finding in respect of the title of the parties, which it was not expected to do. Equally, the same mistake was committed by the first appellate Court, when the judgment of the trial Court was challenged by the plaintiff. Needless to say that in a case,

where the permanent injunction is the only relief asked for, the Court fee has not been paid and no issues have been framed in respect of the reliefs as to the title of the parties, the Courts are not called upon to investigate into the evidence, make discussion of the same and record a finding thereon. It is pertinent to point out that when there was a denial of the title of the plaintiff by the defendants, the plaintiff, though he had the opportunity, had not utilised the same by amending the plaint to include the relief of declaration, but has adduced evidence. The contra evidence was also adduced by the defendants. Both the Courts below have considered in detail the rival claims as to the title, in th e absence of either the necessary relief or the issues or the Court fee in that regard. Without going into the merits or otherwise of the rival contentions put forth before this Court, what are all required to be stated is that the judgment of the lower appellate Court has got to be set aside, and the matter has to be remitted back to the trial Court with a liberty to the plaintiff to seek an amendment of the plaint in respect of the prayer for declaration, and the interest of justice would also require the same.

8. Hence, this second appeal is allowed, setting aside the judgment and decree of the first appellate Court and remitting the matter back to the trial Court with a direction to afford an opportunity to the plaintiff to make necessary amendments in his pleadings, to include the prayer for declaration in respect of the property and to pay the necessary court fee in accordance with law. The defendants should also be given an opportunity to file additional written statement. The trial Court is directed to frame necessary issues thereon, give sufficient opportunity to the parties to adduce additional evidence, if any and adjudicate upon the matter in accordance with law within a period of three months herefrom. No costs.

Index: yes
Internet: yes
To:
1. The II Additional Subordinate Judge
Coimbatore
2. The II Additional District Munsif
Coimbatore
3. The Record Keeper
V.R. Section
High Court, Madras.

nsv/